Supreme Court, U.S.
FILED
NOV 26 1993
OFFICE OF THE CLERK

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The First District

MEMORANDUM FOR RESPONDENT IN OPPOSITION

LISA S. NELSON
Deputy General Counsel
(Counsel of Record)

KATHRYN L. KASPRZAK
Assistant General Counsel
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0750
(904) 488-3140

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the State of Florida's interest in the regulation of the practice of certified public accountancy is served by regulating the disclosure of licensure status when that individual licensee refuses to be bound by the regulatory requirements associated with licensure.

PARTIES TO THE PROCEEDING

*State of Florida, Department of Business and Professional Regulation, Board of Accountancy: Petitioner below, Respondent before this Court.

Silvia S. Ibanez: Respondent below, Petitioner before this Court.

---

* Formerly, State of Florida, Department of Professional Regulation, Board of Accountancy. Name change by legislative enactment, Chapter 93-220, Laws of Florida, effective July 1, 1993.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE AND THE FACTS	1
REASONS FOR DENYING THE WRIT	6
I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT	6
II. THE DECISION BELOW IS NEITHER A BLANKET SUPPRESSION OF COMMERCIAL SPEECH NOR IS IT VIOLATIVE OF THE FIRST AMENDMENT OR THIS COURT'S DECISIONS	6
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES:

Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992) 7

Accountant's Society of Va. v. Bowman, 860 F.2d 602 (4th Cir. 1988) 12, 14

Bates v. State Bar of Arizona, 433 U.S. 350, *rehearing denied*, 434 U.S. 881 (1977) 11

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989) 13

Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 6, 8, 9, 11, 13

Edenfield v. Fane, 507 U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d. 543 (1993) 6

Friedman v. Rogers, 440 U.S. 1, *rehearing denied*, 441 U.S. 917 (1979) 7, 8

Grandee v. Glaser, 785 F. Supp. 684 (S.D. Ohio 1992) 12

In re R.M.J., 455 U.S. 191 (1982) 11, 12

Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990) 6, 10, 11

United States v. DeFusco, 930 F.2d 413 (5th Cir.) *cert. denied*, ___ U.S. ___, 112 S. Ct. 239, 116 L.Ed.2d 194 (1991) 7, 14

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24, 48 L.Ed.2d. 346, 96 S. Ct. 1817 (1976) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Fla. Stat. § 120.57(1) 2

Fla. Stat. Chapter 473 ..... 2, 7, 9

Fla. Stat. § 473.323(1) 2, 5

Fla. Stat. § 473.323(1)(a) 2, 5

Fla. Stat. § 473.323(1)(f) 2, 5

Fla. Stat. § 473.323(1)(g) 2, 5

Fla. Stat. § 473.323(1)(h) 2, 5

Fla. Admin. Code § Rule 21A-24.001 ..... 2, 4, 5, 10

No. 93-639

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

On Petition For A Writ Of Certiorari
To The District Court Of Appeal Of Florida
For The First District

MEMORANDUM FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE AND FACTS

Petitioner, Silvia S. Ibanez, is a practicing attorney, a member of The Florida Bar since 1983, and the sole shareholder and lawyer-employee of her law firm, Silvia S. Ibanez, P.A. She holds an active Florida Certified Public Accountant ("CPA") license, issued by the Florida Board of Accountancy. She became a Certified Financial Planner ("CFP") in 1989. Ibanez is certified as a CFP by the

International Board of Standards and Practices for Certified Financial Planners, the recognized licensing authority of the CFP credential.

In October, 1990, a copy of the "attorney" yellow pages which included Ibanez's listing was mailed to the Florida Board of Accountancy. The advertisement was forwarded to the Florida Department of Professional Regulation ("the Department") and a complaint was opened and investigated. The probable cause panel of the Florida Board of Accountancy found probable cause that Ibanez violated subsections 473.323(1)(a), (f), (g), and (h), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code.

In an Amended Administrative Complaint, the Department charged Ms. Ibanez with violations of subsections 473.323(1)(a), (g), and (h), Florida Statutes, by rendering public accounting services through an unlicensed firm and by appending the CPA designation after her name when providing public accounting services to the public; with violating subsections 473.323(1)(g) and (h) and Rule 21A-24.001 by providing public accounting services and appending the CPA and CFP designations after her name in advertisements; and with violating subsections 473.323(1)(f), (g), (h), and Rule 21A-24.001 by providing public accounting services and by appending the CPA designation after her name in advertisements, when she was not in compliance with the provisions of Chapter 473, Florida Statutes.

Pursuant to section 120.57(1), Florida Statutes, Ms. Ibanez requested and received a formal administrative

hearing on the Amended Administrative Complaint. During the formal hearing, Ms. Ibanez admitted that she held herself out to the public as a CPA. She also admitted during her testimony that her clients considered it "extremely valuable" that she be a CPA and that she considered it valuable to her legal practice to be able to continue advertising that she is a CPA. The Hearing Officer found that Ibanez advertised her professional employment in the yellow pages under the attorney section as "Ibanez, Silvia S. CPA, CFP." In the white pages, Ibanez advertised her professional employment as "Ibanez, Silvia S., CPA, CFP, Atty." In addition, her business card stated "Silvia Safille Ibanez, JD, CPA, CFP." The purpose of these advertisements is to communicate to the public that she is currently licensed as a CPA. The Hearing Officer found that Ibanez's "intent in appending the CPA and CFP credentials . . . to her own name is to indicate [presumably to the public] that she is, in her own right, individually licensed as a CPA and CFP." (Finding of Fact ¶ 16, Petitioner's Appendix 29a).

Testimony was also presented to the Hearing Officer from Elise Rice, a member of the public, and two experts in public accounting. Elise Rice testified that she, as a member of the public, would believe that Appellant was performing both CPA and legal services based on Ibanez's advertisement. (Finding of Fact ¶ 20, Petitioner's Appendix 30a). The two accounting experts testified that Ibanez was engaged in the practice of accountancy by performing accounting services and by advertising her CPA status in the yellow pages and on her business cards, thus offering to perform services for the public that CPAs perform. Finally, the Department established that Ms.

Ibanez's professional firm was not licensed by the Florida Board of Accountancy.

The Department also established that Ms. Ibanez advertised her CFP status in conjunction with her CPA designation. The term "certified," which is implied in CFP, is prohibited by Rule 21A-24.001, Florida Administrative Code, when used in conjunction with the term "CPA" by a CPA in relation to rendering public accounting services.

The Hearing Officer also found that:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of the practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

(Finding of Fact ¶ 14, Petitioner's Appendix 28a). Yet, the Hearing Officer submitted a recommended order which ultimately concluded that Ibanez was not holding herself out to be practicing public accountancy and recommended that all charges against Ibanez be dismissed.

Contrary to Ms. Ibanez's assertions, the Florida Board of Accountancy did not disregard the Hearing Officer's Findings of Fact contained in the Recommended Order. Other than modifications to five paragraphs, the Board adopted all of the Hearing Officer's Findings of Fact. In the Findings of Fact that were adopted by the Board, the Hearing Officer found that Ibanez currently provides through her professional practice

> all types of tax services to her clients, including tax opinion work, representation before the Internal Revenue Service, evaluation of the tax consequences of certain transactions . . . [and] financial counseling and planning for her clients, utilizing her professional education and experience in both public accounting and the law.

(Findings of Fact ¶ 11, Petitioner's Appendix 27a). The Hearing Officer also found, based on Ms. Ibanez's admission, that she performed "substantially similar work" when she worked as a CPA at two accounting firms prior to her admission to The Florida Bar. (Finding of Fact ¶ 12, Petitioner's Appendix 28a).

Based on these findings, the Board rejected the Hearing Officer's Conclusions of Law and instead adopted the Conclusions of Law set forth in the Final Order, finding Ms. Ibanez violated subsections (a), (f), (g), and (h), of section 473.323(1), Florida Statutes, and Rule 21A-24.001, Florida Administrative Code. Based on these conclusions, the Board imposed a reprimand but granted a stay until the completion of any appellate proceedings.

Ms. Ibanez appealed the final order of the Florida Board of Accountancy to the District Court of Appeal, First District of Florida, which affirmed the Board's decision, without opinion, on June 9, 1993. Ms. Ibanez's request for rehearing was denied on July 28, 1993. (See Petitioner's Appendix A and B). On September 23, 1993, Ibanez requested the Board to stay her reprimand pending disposition of her Petition for Writ of Certiorari. The motion was denied.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT.

This case does not warrant review by this Court. The decision below is not in conflict with any ruling by a federal court or the highest court of any state. The issues presented are not sufficiently weighty to deserve the Court's attention. The provisions in question do not constitute a blanket suppression of commercial speech, but rather are reasonable regulations on the use of this speech. The ruling below is entirely consistent with this Court's rulings in *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543, (1993), and *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990). Furthermore, the decision below comports with the requirements of the four-pronged test for determining constitutionality of governmental regulations of commercial speech articulated in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The petition for writ of certiorari should be denied.

II. THE DECISION BELOW IS NEITHER A BLANKET SUPPRESSION OF COMMERCIAL SPEECH NOR IS IT VIOLATIVE OF THE FIRST AMENDMENT OR THIS COURT'S DECISIONS.

Ms. Ibanez asserts that the truthful disclosure of her professional credentials is constitutionally protected commercial speech and that the Florida Board of Accountancy's statute and rule regulating advertising is unconstitutional under the First Amendment of the

United States Constitution. She argues that being prevented from using the term CPA unless she subjects herself to licensure and regulation by the State somehow constitutes an infringement of her commercial speech rights under the First Amendment. Such an assertion is incorrect.

The State of Florida created the term CPA when it passed Chapter 473 and its predecessor statutes. The term clearly indicates that the holder has received licensure from the State and is subject to state regulation. *Compare Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992). Having received CPA registration, Ms. Ibanez's use of that term is subject to the State's continued technical, educational, and licensure requirements. Claiming to be a CPA while engaging in the practice of accountancy is inherently misleading if one is not currently licensed to practice public accountancy or refuses to be bound by the requirements of Chapter 473. The First Amendment provides no protection in either event. *See also United States v. DeFusco*, 930 F.2d 413 (5th Cir.), *cert. denied*, ___ U.S.___, 112 S. Ct. 239, 116 L.Ed.2d 194 (1991)(First Amendment does not protect defendant's publishing activities in misleading victims into believing they had won a contest).

In *Friedman v. Rogers*, 440 U.S. 1, *rehearing denied*, 441 U.S. 917 (1979), this Court upheld a Texas law which prohibited the use of trade names by optometrists. Substantial evidence had been presented to show that the term was being used by certain professionals to mislead the public as to ownership and management of optometry businesses. Finding that the prohibition ensured the communication of accurate information, the Court stated:

> [T]he restriction on the use of trade names has only the most incidental effect on the content of the commercial speech of Texas optometrists. . . . Since the Act does not prohibit or limit the type of informational advertising held to be protected in *Virginia Pharmacy* and *Bates*, the factual information associated with trade names may be communicated freely and explicitly to the public. An optometrist may advertise the type of service he offers, the prices he charges, and whether he practices as a partner, associate, or employee with other optometrists. *Rather than stifling commercial speech, [the Act] ensures that information regarding optometrical services will be communicated more fully and accurately to the consumers than it had been in the past. . . . In sum, Texas has done no more than require that commercial information about optometrical services "appear in such a form . . . as [is] necessary to prevent its being deceptive." [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24, 48 L.Ed.2d 346, 96 S. Ct. 1817 (1976).

440 U.S. at 16 (emphasis added). In accordance with the yardstick set forth in *Friedman* and *Virginia Pharmacy*, the State's regulation of the use of CPA neither infringes Ms. Ibanez's commercial speech rights nor violates the First Amendment.

The State has not banned Ms. Ibanez's use of the CPA designation. It may, however, regulate the use of the term CPA without violating the First Amendment. In *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), this Court articulated a four-prong test for determining the constitutionality of governmental regulations of commercial speech. The test requires that first,

the speech at issue must concern a lawful activity and not be misleading; second, the restriction on commercial speech must serve a substantial governmental interest; third, the regulation must directly advance the asserted governmental interest; and fourth, the regulation must be no more extensive than necessary to advance such an interest. *Id.* at 566.

In the final order of the Florida Board of Accountancy, the Board analyzed Ms. Ibanez's advertisements in light of *Central Hudson*'s four-prong test. The first prong of the *Central Hudson* test is that speech at issue must concern a lawful activity and not be misleading. Ms. Ibanez responds by stating that including her CPA and CFP credentials in her advertising was both truthful and verifiable, and therefore not subject to "blanket suppression" by the State. She further asserts that her appending her certifications to her name in advertising was not potentially or inherently misleading. Ms. Ibanez, however, misstates the findings by the Florida Board of Accountancy. The Board of Accountancy actually found that Ms. Ibanez "has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not," and concluded that such advertising is inherently misleading. (Petitioner's Appendix 11a).

The second prong of the *Central Hudson* test is that the state must assert a substantial interest served by the restriction on commercial speech. In her Petition, Ms. Ibanez does not argue that the State has no substantial governmental interest in ensuring that those who hold themselves out to the public as CPAs remain subject to

the licensure and regulation by the State. Instead, she asserts that the State has no substantial interest in "totally suppressing Petitioner's advertising of her CPA and CFP credentials." This assertion misstates both the law and the facts. The Florida Board of Accountancy rule on advertisements is in no way a blanket prohibition on a CPA from advertising the fact that she is a CPA. Rather, the Board rule makes clear that such an advertisement is permissible where it is neither fraudulent, false, deceptive nor misleading. Rule 21A-24.001, Florida Administrative Code. The rule further clarifies that if the advertising states or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, the statement is prohibited unless accompanied by a disclaimer that the recognizing agency is not affiliated with or sanctioned by the state or federal government. Furthermore, the rule requires that the requirements to achieve such recognition, such as education or examination, be immediately proximate to the statement of recognition as a specialist. The State's continued imposition of regulations and standards of conduct ensure that CPAs provide accounting services in a competent, professional, and ethical manner. Clearly, the State has a substantial interest in ensuring that only those persons who subject themselves to the regulation of the practice of public accounting advertise their qualifications as certified public accountants.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), the Court invalidated a provision which prevented an attorney from advertising the attainment of certified trial advocate from an organization not associated with the state. The Court

reiterated that with the First Amendment, "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." 496 U.S. at 108. *See also Bates v. State Bar of Arizona*, 433 U.S. 350, *rehearing denied*, 434 U.S. 881 (1977)(remedy for potentially misleading information is to use disclaimers); *In re R.M.J*, 455 U.S. 191 (1982)(restriction on advertising should be no broader than necessary). However, the issue that was not presented in *Peel* is now before this Court: whether the State's substantial interest in the regulation of its professions is served by regulating the disclosure of licensure status when that individual refuses to be bound by the regulatory requirements associated with licensure.

Unlike the issue which was presented in *Peel*, publication of CPA status not only implies attainment of having met the requirements for such, but also implies the continued regulation and licensure of the CPA by the State. Indeed, it is this continued imposition of regulations and standards of conduct which ensures that CPAs provide accounting services in a competent, professional, and ethical manner. Clearly and undoubtedly, the State has a real and substantial interest in assuring that practitioners who advertise their status as a CPA remain subject to the State's licensure and regulation requirements.

The third element requires that the regulation directly advance the governmental interest. *Central Hudson*, 477 U.S. at 566. Florida requires that CPAs who engage in the practice of public accounting while holding out as a CPA be subject to the licensure and regulation of the State. By requiring CPAs to be subject to the State's

licensure and regulations, the State is acting in a direct and causal manner to further its interest of ensuring that those CPAs who hold themselves out as practicing public accountancy are in fact competent to do so. Holding oneself out as a professional not only represents that the individual has a license to practice that particular profession, but also represents that the licensee is subject to sanctions for any deficiencies in the practice of the profession.

In *Accountant's Society of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988), the court stated:

> The state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants. The Supreme Court has held that "advertising for professional services may be prohibited when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse." *R.M.J.*, 455 U.S. at 203, 102 S. Ct. at 937. We believe that use of the title "public accountant" by a non-CPA fairly could be characterized as inherently misleading, given the possibility, accurately stated by the district court, that "some members of the public would believe the title . . . has the state's imprimatur."

Id. at 606.

Similarly, in *Grandee v. Glaser*, 785 F. Supp. 684 (S.D. Ohio 1992), licensed hearing aid fitters sought to use the term "certified hearing aid audiologists" in order to

advertise their services. The state restricted the term "audiologist" to only those audiologists who had passed a rigorous educational and certification process, even though hearing aid fitters could perform many of the same services as the licensed audiologists and fit within the definition of that term. Rejecting the First Amendment challenge, the court found the use of the term "audiologist" by the hearing aid fitters to be inherently misleading:

> [T]he court believes that the use of the term "audiologist" by a hearing aid dealer is likely to materially deceive or mislead consumers as to the dealer's educational level. Such deception is "material" in that it is likely that consumers would find the education level of such an individual an important consideration, and one that would most likely affect a choice.

Id. at 691. To the extent that Ms. Ibanez is seeking to trade upon her CPA license to obtain professional employment while at the same time refusing to comply with Chapter 473 for the provision of those services, this case mirrors *Grandee*.

The fourth element of the *Central Hudson* analysis, that the regulation be no more extensive than necessary to advance the State interests, is clearly met here. The regulation under review simply requires those who hold themselves out as CPAs and who provide public accounting services remain subject to licensure and regulation by the State. The regulation is directly tied to the State's interest and is no more extensive than necessary. As such, it passes the fourth prong. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989).

Finally, Petitioner argued below that she can overcome the effects of her advertising by verbal and visual disclaimers, rather than the required written disclaimer. This conduct also may be prohibited as being inherently misleading. *See United States v. DeFusco*, 930 F. 2d 413 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 239, 116 L.Ed.2d 194 (1991); *Bowman*, 860 F.2d at 605-606. Moreover, the State cannot, as a matter of public policy, regulate on the hope that a licensee will provide the proper disclaimers at the appropriate time. Requiring the written disclaimer is a reasonable restriction which ensures that the information the public receives is complete and accurate.

The State seeks to ensure responsible advertising. Ms. Ibanez freely admits that she seeks to append the CPA after her name because her status as a CPA is valuable to her legal clients and that her practice would suffer if she could not. It is axiomatic that when she holds herself out in her current professional practice as a CPA performing accounting services, she holds herself out not only as a CPA, but as a CPA licensed and regulated by the State in that capacity. For the foregoing reasons, the regulation challenged is not a violation of the First Amendment.

As to Ms. Ibanez's CFP status, clearly, the State's interests in her advertisement of such status is the same, and the restriction directly advances the State's concern. Because the terms CPA and CFP, when used in conjunction with each other are so similar, the State may regulate their use so as not to create confusion in the minds of the public as to whether such designation is licensed by the State. Justice Marshall, in his concurrence in *Peel* also noted that it would be misleading for a state to permit a

CPA to advertise his license in conjunction with another designation that contained the term "certificate" as the public might believe that government authorization or certification had been provided. 496 U.S. at 113.

Finally, Ms. Ibanez argues that she is being treated differently from other attorney-CPAs in Florida for no explicable reason. The extent of those licensees' compliance with the applicable rules and statutes is not in the record in this case and is not relevant to this Court's review.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

LISA S. NELSON
Deputy General Counsel
(Counsel of Record)

KATHRYN L. KASPRZAK
Assistant General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-0792
(904) 488-3140

Attorneys for Respondent